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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 499

THE UNITED STATES OF AMERICA, PETITIONER

vs.

ROBERT K. WURTS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 12, 1937
CERTIORARI GRANTED NOVEMBER 15, 1937

SUPREME COURT OF THE UNITED STATES

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1 In United States District Court for the Eastern District of

No. 17984. March Term, 1934

UNITED STATES OF AMERICA

vs.

ROBERT K. WURTS

Charles D. McAvoy, Esq., for Plaintiff. Duane, Morris & Heckscher, Esqs., for Defendant.

Docket entries

1934

Apr. 26.—Praecipe to issue Summons filed.

" " Summons exit—returnable 1st Monday in June, 1934.

May 1.—Summons returned on April 27, served and filed.

2 " 24.—Appearance of Duane, Morris & Heckscher, Esqs., for defandant filed.

Oct. 3.—Statement of Claim with notice to file affidavit of defense filed.

" 16.—Petition for rule to show cause why more specific statement of claim should not be filed and Order of Court granting rule, filed.

" 29.—Argued sur Rule for more specific Statement of Claim—In open Court Rule Absolute.

Nov. 10.—Amended Statement of Claim with notice to file affidavit of defense, filed.

" 23.—Affidavit of Defense raising questions of law filed.

Dec. 10.—Praecipe to place case on Argument List filed.

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Mar. 20.—Opinion, Dickinson, J., granting leave to file supplemental affidavit of defense in 15 days filed.

Apr. 2.—Supplemental Affidavit of Defense, New Matter and Notice to file reply to New Matter, filed.

" 24.—Motion for judgment for want of sufficient affidavit of defense and Order of Court granting rule to show cause etc., filed.

May 25.—Argued sur rule for judgment for want of sufficient affidavit of defense.

Aug. 28.—Opinion, Dickinson, J., finding for defendant filed.

3 Oct. 9.—Motion by defendant for leave to withdraw Supplemental Affidavit of Defense filed.

" 9.—Order of Court directing that Supplemental Affidavit of Defense be marked withdrawn, vacating order overruling statutory demurrer, and sustaining demurrer and entering judgment for defendant filed.

1937

Jan. 4.—Plaintiff's exception and Order of Court allowing same filed.
" 4.—Petition for Appeal and Order of Court allowing appeal filed.
" 11.—Assignments of error filed.
" 11.—Citation allowed and issued.
" 11.—Copy of Notice of Appeal filed.
" 11.—Praecipe for transcript of record filed.
" 25.—Citation returned "service accepted" and filed.

In United States District Court

Plaintiff's statement of claim.

Filed Oct. 3, 1934

And Now comes the United States of America by its attorney Charles D. McAvoy, United States Attorney in and for the Eastern District of Pennsylvania, who prosecutes this action for and on behalf of the United States of America, and for cause of complaint against the above named defendant, alleges as follows:

1. That at all times herein after mentioned the claimant has been and now is a corporation sovereign and body politic.

2. That the defendant, Robert K. Wurts, was at all times hereinafter mentioned and is now, a citizen and resident of Philadelphia County, Pennsylvania, which is within the jurisdiction of this Court.

3. That this is an action by the United States of a civil nature at law arising under the Internal Revenue Laws of the United States, instituted at the request of the Commissioner of Internal Revenue and is authorized and sanctioned by the Attorney General of the United States.

4. That on or about April 30, 1932, and within two years prior to the institution of this action the plaintiff, through its Commissioner of Internal Revenue, by error, paid to the defendant the sum of Four Thousand Five Hundred Thirteen Dollars and Thirty-seven Cents ($4,513.37) as a refund to defendant upon income taxes previously paid by him for the calendar year 1929; said refund being the amount paid to the taxpayer on account of an erroneously allowed deduction or exclusion from the reported income of said taxpayer in the sum of Twenty-one Thousand Eight Hundred Thirty-five Dollars and Eighty-seven Cents ($21,835.87) from the previously reported income of said taxpayer (as increased by a previously omitted item of income of Two Hundred and Fourteen Dollars ($214.00), of Ninety-four Thousand Two Hundred Seventy-nine Dollars and Fourteen Cents ($94,279.14), upon which a tax of Seven-

teen Thousand Two Hundred and Thirty-nine Dollars and Ninety Cents ($17,239.90) had theretofore been paid.

5 That the defendant received of and from the plaintiff said sum of Four Thousand Five Hundred Thirteen Dollars and Thirty-seven Cents ($4,513.37) through inadvertence, error and mistake, as aforesaid, but without bad faith on his part or intent to defraud plaintiff; that he retained said sum which plaintiff claims.

Wherefore, the retention by the defendant of this refund against the demand of the plaintiff is wrongful and unlawful, and the plaintiff is entitled to judgment in the sum of Four Thousand Five Hundred Thirteen Dollars and Thirty-seven Cents ($4,513.37), together with interest thereon at six per cent per annum from the date of payment of said refund and the costs of this action.

(s) CHARLES D. McAVOY,
United States Attorney.

[*Duly sworn to by Charles D. McAvoy; jurat omitted in printing.*]

6 In United States District Court

Order granting rule to show cause

Filed Oct. 16, 1934

Before DICKINSON, J.

And now, to wit, this 16th day of October, A. D. 1934, upon consideration of the within petition, and upon motion of Duane, Morris & Heckscher, Esquires, Attorneys for Petitioner, the Court grants a rule on the plaintiff to show cause why a more specific Statement of Claim should not be filed in the above cause. Returnable Oct. 29, 1934 at 10 a. m.

By the Court.

Attest:

GEORGE BROBECK, *Clerk.*

7 In United States District Court

Petition in support of rule for a more specific statement of claim

Filed Oct. 16, 1934

To the Honorable, the Judges of said Court:

The petition of Robert K. Wurts respectfully represents:

That he is the defendant in the above entitled action, in which a copy of Plaintiff's Statement of Claim is attached to this petition as "Exhibit A", and that said Statement of Claim is not sufficiently specific so as to enable this defendant to answer the same, for the following reasons:

1. Paragraph 4 of the Statement while alleging that on or about April 30, 1932, and within two years prior to the institution of this action, the plaintiff by error paid to the defendant Four thousand five hundred thirteen dollars and thirty-seven cents ($4,513.37) as a refund to defendant, fails to allege specifically upon what date said refund was in fact made or certified by order of the Treasury Department, acting through the Collector of Internal Revenue, or from what date interest was allowed or included in said amount alleged to be refunded.

2. Plaintiff's Statement of Claim while alleging that the refund was an amount paid to the defendant taxpayer on account of an erroneously allowed deduction or exclusion from the reported income of the taxpayer, and that the defendant received from
8 the plaintiff said amount through inadvertence, error and mistake, fails to allege in what respect, and under what circumstances, said deduction was erroneously allowed, or through what inadvertence, error and mistake the defendant received the amount alleged to have been paid him by the Treasury Department.

Your petitioner therefore prays that a rule issue to show cause why the plaintiff should not file a more specific Statement of Claim.

DUANE, MORRIS & HECKSCHER,
By (s) ARCHIBALD T. JOHNSON,
Attorneys for Robert K. Wurts, Defendant.

[*Duly sworn to by Robert K. Wurts; jurat omitted in printing.*]

9 *Exhibit A to petition*

[Omitted. Printed side, page 3 ante.]

12 In United States District Court

Amended statement of claim

Filed Nov. 10, 1934

And now comes the United States of America by its attorney Charles D. McAvoy, United States Attorney in and for the Eastern District of Pennsylvania, who prosecutes this action for and on behalf of the United States of America, and for cause of complaint against the above named defendant, alleges as follows:

1. That at all times hereinafter mentioned the claimant has been and now is a corporation sovereign and body politic.

2. That the defendant, Robert K. Wurts, was at all times hereinafter mentioned and is now, a citizen and resident of Philadelphia County, Pennsylvania, which is within the jurisdiction of this Court.

3. That this is a suit at law of a civil nature, arising in connection with the administration of the law of Congress providing for internal revenue, and this action is commenced and maintained at the

request of the Commissioner of Internal Revenue and sanctioned and under the direction of the Attorney General of the United States.

4. That the defendant Robert K. Wurts is the widower of Katherine N. Wurts, and that under the provisions of the testator's will defendant was to receive as beneficiary certain net income.

5. That the defendant accepted the terms of said will, and
13 the year involved (1929) received income from the trustee under the trust so created by said will.

6. In accordance with the provisions of an Act of Congress entitled "An Act to reduce and equalize taxation, to provide revenue, and for other purposes," approved May 29, 1928, c. 852, 45 Stat. 791, which is hereinafter referred to as the Revenue Act of 1928, the defendant Robert K. Wurts, on or about March 15, 1930, filed with the Collector of Internal Revenue for the First Collection District of Pennsylvania individual income tax on Form 1040 for the calendar year 1929.

7. On the return so filed, the defendant, Robert K. Wurts, reported a net income of $94,065.14 and a tax to be due thereon of $17,195.14, which tax was duly paid.

8. Thereafter, an audit was made of the defendant's 1929 return, and as a result thereof the Commissioner of Internal Revenue erroneously determined that the defendant's reported net income was overstated in the amount of $21,835.87, representing the amount received by him as beneficiary of the trust created under the will of his wife, for the reason that the amount so deemed to be a capital expenditure of the trust applied in excess of the defendant's statutory rights in the estate of his wife, and not equal to or in excess of the value of his aforesaid statutory rights. Said determination was erroneous and illegal for the reason that the Commissioner of Internal Revenue was without authority to so compute defendant's tax.

9. Thereafter an overassessment certificate issued as of Sched-
14 ule IT-46030, dated March 15, 1932. Said certificate of overassessment was based upon the holding as set out in paragraph 8 above.

10. As a result of said overassessment, certificate check dated April 30, 1932, in the amount of $4,513.37 was mailed to the taxpayer, although defendant was not legally entitled to the tax above referred to, and the taxes described in paragraph 7 hereof have been properly levied by the plaintiff, and said adjustment was erroneous and illegal.

11. That by virtue of the examination and erroneous action of the Commissioner of Internal Revenue in making the adjustment hereinbefore set out, and his allowance of defendant's claim for exemption and refund of his tax, the sum of $4,183.77 together with interest thereon in the amount of $329.60, making a total of $4,513.37, was mistakenly and unlawfully paid out of the Treasury of the United States to the defendant when the same did not belong to him, and the defendant, although liable to repay the said sum of $4,513.37,

has refused to do so and still refuses to repay to the plaintiff said sum or any part thereof, although it has been duly demanded.

Wherefore, plaintiff prays judgment against the defendant, Robert K. Wurts, for the sum of $4,513.37, together with interest according to law from April 30, 1932, and for the costs of this action.

CHARLES D. MCAVOY,
United States Attorney.

15 [*Duly sworn to by Charles D. McAvoy; jurat omitted in printing.*]

In United States District Court

Affidavit of defense raising question of law

Filed Nov. 23, 1934

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

Robert K. Wurts, being duly sworn according to law, de-
16 poses and says that he is the defendant above named and that the Amended Statement of Claim filed by the United States of America as plaintiff in the above is not sufficient in law, for the following reason:

The Amended Statement of Claim while claiming to recover a refund of Four thousand, five hundred thirteen dollars and thirty-seven cents ($4,513.37), shows on its face that suit was not brought before the expiration of two (2) years after the making of the refund, in that the certificate of over-assessment was issued to defendant on March 15, 1932, and as appears from the Statement of Claim, credit was set up in defendant's favor on that date, whereas the suit was brought, as appears by the record in this case, on April 26, 1934.

(Robert K. Wurts.)
(Signed) ROBERT K. WURTS.

Sworn to and subscribed before me this 20th day of November, A. D. 1934.

[SEAL] (Signed) A. A. JONES, *Notary Public.*

My commission expires Jan. 18, 1935.

17 In United States District Court

Opinion sur statutory demurrer

Argued March 18th, 1936

Filed March 20, 1936

DICKINSON, J., March 20th, 1936.

The question has been discussed as one of the limitation of actions. The difference may be no more than verbal but we do not think the

question one of limitations. It is one of the conditions of the cause of action. The action is to recover moneys voluntarily paid but afterwards discovered to have been erroneously paid to a taxpayer. No right of action would exist without a statute. The Act of Congress gives a cause of action and a right of action, if a distinction exists between the two, upon the terms that the action be brought within two years of the date mentioned in the Act. The distinction between a limitation and a condition, as above outlined, has importance. If a litigant has a cause of action but the assertion of it is subject to a Statute of Limitation, the limitation is a defense which must be pleaded. If, however, the requirement that the action be brought within the limit of time is a condition of the right of action then no right of action exists unless there has been a compliance with the limitation. The absence of it is in consequence a proper subject of a demurrer. The Act of Congress which gives this cause of action gives it on the terms that the action be brought within two years "after the making of" the refund sought to be recovered.

In the process of "refunding" a tax erroneously paid
18 there are several successive steps. The like comment applies to the act of determining that the "refunding" was erroneous. The final step in the "refunding" of a tax found to have been erroneously paid is the payment to the tax payer of the sum found to have been paid by him in excess of the tax sum which he owed. The first step in the recovery of a "refund" erroneously paid is the determination of the fact that it was paid in error. The final step is the bringing of the action to recover what had thus been erroneously paid.

Section 1104 of the Revenue Act of 1932 defines what is meant by the date of the allowance of the "refund." This date is defined to be "the date on which (the Commissioner) first signed (the schedule of over assessment) shall be considered as the date of allowance or refund or credit in respect of such tax. It will be noted that the one section which gives the cause of action uses the phrase "the making of such refund." The other section just referred to defines the date as "the date of allowance of refund or credit in respect to such tax." In the administration of legal justice, it is, at least usually, more important to have the law determined than it is to have it correctly determined. A wrong judgment of what the law is may be accepted and acted upon but uncertainty as to what the law is leaves the law unknown. To quote (from memory) a famous judicial utterance "bad laws can be borne but a vadum aut incertum law cannot be endured."

Applied to the facts of this case, if the question before us is determined one way or the other the interpretation may be accepted and acted upon even although it may be thought to be erroneous.

The case of Paulson vs. U. S., 78 Fed. Rep. (2d),
19 97, is authority for the conclusion that the instant action was brought in time.

A very forceful and elaborate argument has been addressed to us to lead us to the conclusion that the judgment in the Paulson case was erroneous. The full weight of this argument is felt but it does not change the fact that the cited judgment was rendered. The ruling is by the Circuit Court of Appeals for the Tenth Circuit. In the absence of any conflicting ruling by the Court of this Circuit or by the Supreme Court, the cited case is authoritative, and one which we feel bound to follow.

The question of law raised is accordingly ruled against the defendant who has leave to file a supplemental affidavit of defense to the averments of fact of the statement of claim within fifteen days.

In United States District Court

Supplemental affidavit of defense

Filed April 2, 1936

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

Robert K. Wurts, being duly sworn according to law, deposes and says that he is the defendant above-named and that he has a just, true, full and legal defense to the plaintiff's claim, the nature and character of which is as follows, this being a Supplemental Affidavit of Defense filed pursuant to leave of the Court entered March 20, 1936, overruling deponent's statutory demurrer:

The averments of fact in the First to Eleventh Paragraphs of Plaintiff's Amended Statement of Claim are admitted, with the qualification that check dated April 30, 1932 for Four thousand five hundred and thirteen dollars and thirty-seven cents ($4,513.37) was mailed to taxpayer as a result of Schedule IT–46030, dated March 15, 1932, making said refund, and not as a result of Certificate of Overassessment as alleged by plaintiff in Paragraph 10.

NEW MATTER

Filed April 2, 1936

1. Defendant alleges that suit was brought in the above entitled case on April 26, 1934, and that the refund, the amount of which plaintiff seeks to recover, was made on March 15, 1932, which was the time of signing by the Commissioner of Internal Revenue of the Schedule of Overassessment in this case, to wit, Schedule IT–46030, dated March 15, 1932, as of which Schedule the Certificate of Overassessment was issued to the defendant, as set forth in Paragraph 9 of Plaintiff's Amended Statement of Claim, and that the amount of said refund is not recoverable by suit in that said suit was not begun before the expiration of two (2) years after the mak-

ing of said refund, as required by Section 610 of the Revenue Act of 1928, as amended by the Revenue Act of 1932.

(Robert K. Wurts).
ROBERT K. WURTS.

21 Sworn to and subscribed before me this 1st day of April, A. D. 1936.

[SEAL] A. A. JONES, *Notary Public.*

My Commission Expires Jan. 18, 1939.

In United States District Court

Motion for judgment for want of sufficient affidavit of defense and rule to show cause thereon

Filed April 24, 1936

Now comes Charles D. McAvoy, United States Attorney in and for the Eastern District of Pennsylvania, and moves for judgment, assigning therefor the following reasons:

1. The Supplemental Affidavit of Defense and New Matter raised therein does not raise any evidence sufficient in law or fact to prevent judgment on the pleadings.

(s) CHARLES D. McAVOY,
United States Attorney.

22 *Rule to show cause*

Before DICKINSON, J.

And Now, to wit: this 24 day of April, A. D. 1936, upon motion of Charles D. McAvoy, the Court grants rule to show cause against the defendant why judgment should not be entered for want of a sufficient affidavit of defense.

Said rule returnable 25th day of May, A. D. 1936, Room 303, Post Office Building, 9th and Chestnut Streets, Philadelphia.

By the Court.

Attest:

LEO A. LILLY, *Deputy Clerk.*

In United States District Court

Opinion sur rule for judgment

Filed Aug. 28, 1936

DICKINSON, J., August 28th, 1936.

An Act of Congress gives the United States the right to recover from a taxpayer moneys re-paid to the taxpayer out of taxes paid by him upon the tax payment being found to have been erroneously made and the finding being afterwards found to have itself been erroneous. The right to recover for any such re-payment is how-

ever conditioned upon suit therefor being brought within two
23 years of the refunding or return of the taxes supposedly
erroneously paid. The question in this case is whether the suit was instituted within the two years. In the process for the return of an over payment of taxes there are several steps. The first is a determination that the taxpayer has made an over payment. The final step is the delivery to him of a check or other voucher for the sum over paid. The substantial question is whether the two years within which the suit must be brought begins to run at the date of the erroneous finding that the taxpayer was entitled to a return of his money or begins to run when the check for the return payment reaches the taxpayer. If the first suggested date is the correct one, this action was not brought in time; if the second date suggested is the correct one, it was brought in time. In discussing the question we will ignore the intermediate steps, such as authorizing the issuance of the check and the making of it out.

The question was first raised on a statutory demurrer. We ruled it in favor of the plaintiff on the authority of the case of Paulson vs. U. S., 78 Fed. Rep. (2d), 97, and overruled the demurrer, with leave to the defendant to file an affidavit of defense. This affidavit was filed raising the same question as before, and is met by a rule for judgment.

DISCUSSION

What we have is in effect a re-argument of the question before ruled. We repeat the comment before made that the question is one which it is more important to have settled than to have settled in
accordance with legal logic. Congress undoubtedly could have
24 conditioned the right to bring this action upon any terms it
saw fit. It imposed a two years' limitation condition. In every case a date must be found at which the two years begins to run. At least the earlier Acts left this date more or less uncertain. We say this because of the litigation provoked. The Paulson case, as we view it, determined the last of the two dates mentioned to be the date intended by the Act of Congress. Independently of the question of the correctness of the conclusions reached, our view was that this ruling should be accepted as a finality. The very question raised here was presented for the consideration of Congress, and was disposed of in an amendment of Section 610 of the Revenue Act of 1928 by the Revenue Act of 1932. We are of course bound by the latest legislation on the subject. If the rule announced in the Paulson case has been since changed by legislation, we must follow the latter. The Paulson case was ruled after the amendment had been passed but no reference was made to it in the opinion disposing of that case. The omission to refer to it would, however, be of no importance if it was in force. It is now urged, however, that the amended Act had no bearing upon the Paulson case because the case arose before the amendment and by its terms did not have applica-

tion. A re-examination of the case discloses that this is true and hence the instant case is to be ruled not in accordance with the Paulson ruling but in accordance with Section 1104 of the Act of 1932. This defines the date for which the two years begins to run as the date when the Commissioner first signed the "schedule of over payment in respect of" the Internal Revenue tax claimed to have been over paid. Under the facts of this case this date brands the
25 action as brought too late. As the Paulson case was determined under the provisions of the prior Acts, and the instant case is to be determined under the latter amendment, it follows that the Paulson ruling does not apply.

This conclusion confronts us with a procedural difficulty. We ruled on the statutory demurrer that the action had been brought in time. We are now asked to rule that it had not been brought in time. The ruling made, whether erroneous or not, became, when made, the law of the case, from which we would not at any subsequent stage be at liberty to depart. We must therefore get rid of the ruling before made before we can make the ruling now asked to be made. This can only be done in one of two ways. The ruling on the statutory demurrer may be revoked and the statutory demurrer withdrawn and the present motion for judgment refused, or we can treat the affidavit of defense as withdrawn, and the present motion as one for a re-argument of the statutory demurrer. If the first mode of procedure is followed, the case must go to trial. If the second mode is followed, we can now dispose of the case as upon a re-argument of the statutory demurrer, vacate the order made, and now enter an order in accordance with the Practice Act of 1915, sustaining the statutory demurrer. We think it is the province of counsel for the defendant to determine the procedure to be followed.

We therefore dispose of the case by granting leave to submit an order in accordance with this opinion.

26 In United States District Court

Motion for leave to withdraw supplemental affidavit of defense

Filed Oct. 9, 1936

And now, October 9th, 1936, comes Robert K. Wurts, the defendant above-named, by his attorneys, Sanford D. Beecher and Archibald T. Johnson, Esquires, and moves the Court as follows:

(a) To grant leave to the defendant to withdraw the Supplemental Affidavit of Defense filed in the above and to order the same to be marked "Withdrawn."

SANFORD D. BEECHER,
ARCHIBALD T. JOHNSON,
Attorneys for Defendant.

In United States District Court

Judgment

Filed October 9, 1936

And now, to wit, this 9th day of October 1936, it is ordered (a) Defendant's motion to withdraw the Supplemental Affidavit of Defense filed herein is granted and the clerk is directed to mark the same "withdrawn".

(b) Reargument upon affidavit of defense by way of statutory demurrer having been had, the order heretofore made overruling the statutory demurrer is vacated.

(c) The said statutory demurrer is sustained, and final judgment entered for defendant herein in accordance with opinion filed on August 28, 1936.

By the Court,

DICKINSON, *J.*

In United States District Court

Exception to judgment

Filed Jan. 4, 1937

And now, to wit, this 4th day of January, A. D. 1937, the plaintiff, The United States of America, by its attorney, Charles D. McAvoy, United States Attorney in and for the Eastern District of Pennsylvania, excepts to the action of the Court in entering judgment for the defendant.

CHARLES D. McAVOY,
United States Attorney.
THOMAS J. CURTIN,
Assistant United States Attorney.

In United States District Court

Order allowing exception

Filed Jan. 4, 1937

And now, to wit, this 4 day of January, A. D. 1937, the above exception is allowed.

O. B. DICKINSON, *J.*

In United States District Court

Assignment of errors

Filed Jan. 11, 1937

And now, to wit, this fourth day of January, A. D. 1937, comes the United States of America by its attorney, Charles D. McAvoy,

United States Attorney in and for the Eastern District of Pennsylvania, and makes and files this assignment of errors:

1. The learned trial judge erred in holding that the plaintiff's action was not commenced within the time allowed by law.

2. The learned trial judge erred in holding that under the action brought under Section 610 of the Revenue Act of 1928 for the recovery of monies erroneously refunded to the defendant the limitation period for bringing of such action was two years from the issuance of the certificate of overassessment.

29 3. The learned trial judge erred by sustaining defendant's statutory demurrer to plaintiff's petition.

4. The learned trial judge erred in allowing the entry of judgment in favor of the defendant and against the plaintiff.

CHARLES D. MCAVOY,
United States Attorney.
THOMAS J. CURTIN,
Assistant United States Attorney.

In United States District Court

Petition for appeal

Filed Jan. 4, 1937

And now, to wit: this 4th day of January, A. D. 1937, comes the United States of America, by its attorney Charles D. McAvoy, United States Attorney in and for the Eastern District of Pennsylvania, feeling aggrieved by the judgment entered herein on October 9, 1936, in favor of the defendant and against the plaintiff, does hereby appeal from said judgment and from the whole and every part thereof to the United States Circuit Court of Appeals for the Third Circuit, and prays that said appeal may be allowed and does hereby present its assignment of errors, and prays that said

30 case may be certified to the said Circuit Court of Appeals for the Third Circuit.

CHARLES D. MCAVOY,
United States Attorney.
THOMAS J. CURTIN,
Assistant United States Attorney.

In United States District Court

Order allowing appeal

Filed Jan. 4, 1937

Before DICKINSON, J.

And now, to wit: this 4 day of January, A. D., 1937, it is ordered that the appeal be allowed as prayed for.

By the Court,

DICKINSON, *J.*

31 In United States District Court

Praecipe for record

Filed Jan. 11, 1937

To the Clerk, United States District Court for the Eastern District of Pennsylvania:

Sir: Prepare transcript of the record in the above entitled case for filing in appeal to the Circuit Court of Appeals and include the following:

Docket Entries.

Statement of Claim.

Petition for rule to show cause why more specific Statement of Claim should not be filed, and Order of Court granting same.

Amended Statement of Claim.

Affidavit of Defense raising questions of law.

Opinion, Dickinson, J., granting leave to file supplemental affidavit of defense.

Supplemental Affidavit of Defense and New Matter.

Motion for judgment for want of sufficient Affidavit of Defense and Order of Court granting rule to show cause, etc.

Opinion, Dickinson, J., finding for defendant.

Motion by defendant for leave to withdraw Supplemental Affidavit of Defense.

Order of Court directing that Supplemental Affidavit of Defense be marked withdrawn, vacating order over-ruling statutory demurrer and sustaining demurrer, and entering judgment for defendant.

32

Exception, and Order allowing same.

Assignment of Errors.

Petition for Appeal.

Order allowing petition for appeal.

Praecipe for Record sur Appeal.

Clerk's certificate, and no others.

Charles D. McAvoy,
United States Attorney.
Thomas J. Curtin,
Assistant United States Attorney.

[Clerk's certificate to foregoing transcript omitted in printing.]

34 In United States Circuit Court of Appeals for the Third Circuit

[Title omitted.]

Minute entry of hearing

And afterwards, to wit, the 2d day of April 1937, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph

Buffington, Honorable J. Whitaker Thompson, and Honorable John Biggs, Jr., Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 13th day of July 1937, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

35 In United States Circuit Court of Appeals for the Third Circuit

No. 6326. March Term, 1937

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

ROBERT K. WURTS, DEFENDANT-APPELLEE

Upon Appeal From the District Court of the United States for the Eastern District of Pennsylvania

Before BUFFINGTON, THOMPSON, and BIGGS, Circuit Judges.

Opinion

Filed July 13, 1937

THOMPSON, Circuit J.

This is an appeal from a judgment of the District Court for the Eastern District of Pennsylvania. The United States brought suit, April 26, 1934, for the recovery of 1929 income taxes alleged to have been erroneously refunded to the taxpayer, appellee herein. The certificate of over-assessment was issued to the appellee on March 15, 1932, but the check was not mailed until April 30, 1932. The District Court entered judgment for the appellee upon an
36 affidavit of defense in lieu of a statutory demurrer, ruling that more than two years had expired after the making of the refund.

The following statutory provisions are involved:

Revenue Act of 1928, 26 U. S. C. A. 1646.

"(b) Any portion of an internal revenue tax . . . which has been erroneously refunded . . . may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of such refund."

Revenue Act of 1932, 26 U. S. C. A. 1670.

"(3) Where the Commissioner has (before or after June 6, 1932) signed a schedule of overassessments in respect of any internal revenue tax imposed by the Revenue Act of 1932, or any prior revenue Act, the date on which he first signed such schedule (if after May 28, 1928) shall be considered as the date of allowance of refund or credit in respect of such tax."

The Revenue Act of 1928 (26 U. S. C. A. 1646) provides that suit for recovery of a refund may be brought only if begun before the

expiration of two years after the making of the refund. The dispute arises because of conflicting interpretations of the meaning of the word "making." The appellant contends that a refund is "made" only upon payment of the check, the appellee contends that a refund is "made" immediately upon the signing of the schedule of overassessment. Light is thrown upon the Congressional intent when we examine the quoted section of the Revenue Act of 1932 (26 U. S. C. A. 1670) which determines the date of allowance of refund as the date on which the Commissioner signed the schedule of overassessment. Committee Reports of both Senate and House
37 lend additional weight to the theory that the refund is made when the schedule of overassessment is signed. The United States is given statutory leave to recover refunds, but only upon the condition that the action be brought within two years from the date of the signing of the schedule of overassessment. The case of Paulson v. United States, 78 F. (2d) 97, involved refunds which did not come within the period prescribed in the Revenue Act of 1932 and is therefore inapplicable. We are of the opinion that the District Court correctly entered judgment on the pleadings.

The judgment of the Court below is affirmed.

A true Copy:

Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

38 In United States Circuit Court of Appeals for the Third Circuit

No. 6326. March Term, 1937

UNITED STATES OF AMERICA, PLAINTIFF APPELLANT,

vs.

ROBERT K. WURTE, DEFENDANT APPELLEE

Judgment

Filed July 13, 1937

On appeal from the District Court of the United States, for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby Affirmed.

Philadelphia, July 13, 1937.

J. W. THOMPSON,
Circuit Judge.

[File endorsement omitted.]

39 [Clerk's certificate to foregoing transcript omitted in printing.]

40 Supreme Court of the United States

Order allowing certiorari

Filed November 15, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Endorsement on cover:) File No. 41,980. U. S. Circuit Court of Appeals, Third Circuit. Term No. 499. The United States of America, Petitioner vs. Robert K. Wurts. Petition for a writ of certiorari and exhibit thereto. Filed October 13, 1937. Term No. 499 O. T. 1937.

U. S. GOVERNMENT PRINTING OFFICE: 1937